Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MARY ELIZABETH DUNN,

Petitioner,

v.

MIKE DENK,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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II. DOES THE QUALIFIED IMMUNITY DEFENSE CONTINUE TO BE AVAILABLE IN EXCESSIVE FORCE CASES AFTER IT HAS BEEN DETERMINED THAT THE OFFICER USED OBJECTIVELY UNREASONABLE FORCE?

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Petitioner Mary Elizabeth Dunn, respectfully prays that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit entered *en banc* on March 19, 1996.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Mary Elizabeth Dunn v. Mike Denk*, 79 F.3d 401 (5th Cir. 1996) (*en banc*). (App. A-1) Rehearing *en banc* was granted on August 1, 1995. (App. F-1) The Panel Opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Mary Elizabeth Dunn v. Mike Denk*, 54 F.3d 248 (5th Cir. 1995). (App. B-1) The district court's unreported judgment was entered on August 10, 1993, and is set forth in the Appendix at C-1.

JURISDICTION

The *en banc* judgment of the Court of Appeals was entered on March 19, 1996.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Fourth Amendment to the United States Constitution. This case also involves the

Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983. The relevant constitutional provision is set out in its entirety at Appendix D-1. The relevant statute is set out in its entirety at Appendix E-1.

STATEMENT OF THE CASE

Trooper Denk used objectively unreasonable excessive force against Mary Elizabeth Dunn on January 13, 1990 when he yanked her out of the car in which she was a passenger and threw her in the ditch during the course of executing an arrest warrant for failure to appear in connection with an unpaid speeding ticket. Trooper Denk's excessive force proximately caused significant mental injury and insignificant physical injury to Plaintiff Dunn.

Trial began on July 19, 1993 and concluded on July 21, 1993. The district court entered judgment in behalf of Mary Elizabeth Dunn against Trooper Denk on August 10, 1993. (App. C-1) A panel of the Fifth Circuit affirmed in part, vacated in part, and remanded on June 13, 1995. The case is reported at 54 F.3d 248 (5th Cir. 1995). (App. B-1) Specifically, the court affirmed the finding that Trooper Denk used excessive force, vacated the judgment, and remanded for new trial limited to the issue of damages. On August 1, 1995 the court on its own motion granted a rehearing *en banc*. (App. F-1) On March 19, 1996 the court, sitting *en banc*, reversed. 79 F.3d 401 (App. A-1).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FIFTH CIRCUIT OPINION SQUARELY CONFLICTS WITH THE REPEATED HOLDINGS OF THIS COURT THAT QUALIFIED IMMUNITY DOES NOT SHIELD OFFICERS WHO USE OBJECTIVELY UNREASONABLE FORCE IN VIOLATION OF WELL-SETTLED LAW.

A. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FIFTH CIRCUIT OPINION CONFLICTS WITH THE HOLDINGS OF THIS COURT.

This Court has repeatedly held that only the objective reasonableness of conduct measured by reference to clearly established law is relevant to the issue of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Davis v. Scherer*, 468 U.S. 183 (1984); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Siegert v. Gilley*, 500 U.S. 226 (1991); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151 (1995). It is well-established that excessive force cases are to be analyzed under the objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386 (1989).

In holding that Defendant Officer Denk was shielded by qualified immunity, despite his use of objectively unreasonable force in violation of well-settled law because the extent and nature of the injury required in excessive force cases was purportedly unclear, the Fifth Circuit ignored over a decade of excessive force and qualified immunity analysis by this Court.

B. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE CONSIDERATION OF THE NATURE AND EXTENT OF THE DAMAGES IS WHOLLY IRRELEVANT TO THE OBJECTIVE REASONABLENESS OF THE CONDUCT.

The extent and nature of damages have absolutely nothing to do with the objective reasonableness or unreasonableness of conduct. This Court has repeatedly held that the objective reasonableness of the conduct as measured against clearly established law is the only relevant factor to consider for qualified immunity purposes. *Harlow, supra; Davis, supra; Mitchell, supra; Malley, supra; Anderson, supra; Siegert, supra; Hunter, supra; Johnson, supra.* In holding that Defendant Officer Denk was shielded by qualified immunity despite his use of unreasonable force in violation of well-settled law, the Fifth Circuit ignored over a decade of qualified immunity analysis by this Court.

C. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE OF THE SWEEPING IMPACT OF THE FIFTH CIRCUIT OPINION. SPECIFICALLY, THE OPINION ALLOWS POLICE OFFICERS AND OTHER GOVERNMENT OFFICIALS TO TRAMPLE ON THE CONSTITUTIONAL RIGHTS OF CITIZENS BY ENGAGING IN OBJECTIVELY UNREASONABLE CONDUCT IN VIOLATION OF WELL-SETTLED LAW SO LONG AS ELEMENTS OF THE CAUSE OF ACTION WHOLLY UNRELATED TO CONDUCT ARE UNCLEAR.

Virtually every constitutional tort cause of action includes elements other than conduct. Shielding government officials who engage in objectively unreasonable conduct

in violation of clearly established law when the other elements of the cause of action are not clearly established leaves government officials free to trample on the constitutional rights of innocent citizens. For example, in the case at bar, it has long been known by all reasonable officers that excessive force is forbidden. Nevertheless, the Fifth Circuit, sitting *en banc*, shielded Defendant Denk with qualified immunity, despite his use of excessive force, because it was not clear in the Fifth Circuit at the time of the incident that significant mental injury, no matter how severe and no matter how excessive the force, was sufficient for recovery.[1] Stated differently, the Fifth Circuit's qualified immunity analysis leaves Defendant Officer Denk and other officials free to trample on the constitutional rights of innocent citizens, even when their conduct is objectively unreasonable and in violation of well-settled law.

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[1] The Fifth Circuit gratuitously created this "unsettled law" with a footnote in *Johnson v. Morel*, 876 F.2d 477, 480 n. 1 (5th Cir. 1989) (*en banc*) despite the fact that this Court had already set out the requirements for an excessive force case in *Graham v. Connor, supra*, thereby settling the question.

D. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE PROVIDING QUALIFIED IMMUNITY TO GOVERNMENT OFFICIALS WHO ENGAGE IN OBJECTIVELY UNREASONABLE CONDUCT IN VIOLATION OF WELL-SETTLED LAW BECAUSE OF FACTORS UNRELATED TO CONDUCT DISTORTS THE CAREFULLY CRAFTED JUDGE-MADE BALANCE BETWEEN GOVERNMENT OFFICIALS WHO NEED TO VIGOROUSLY DISCHARGE THEIR RESPONSIBILITIES SO LONG AS THEY DO NOT VIOLATE CLEARLY ESTABLISHED LAW AND INNOCENT CONSTITUTIONAL TORT VICTIMS WHO ARE ENTITLED TO REDRESS UNLESS THE GOVERNMENT OFFICIAL'S CONDUCT IS OBJECTIVELY REASONABLE AND DOES NOT VIOLATE CLEARLY ESTABLISHED LAW.

This Court has determined that government officials who violate the constitutional rights of citizens should be protected by qualified immunity unless the official's conduct is objectively unreasonable and in violation of well-settled law. *Harlow, supra.* This judge-made law was developed because of the public's desire that government officials discharge their duties vigorously without fear of reprisal so long as their conduct is objectively reasonable. *Harlow, supra; Anderson, supra.* Of course, this policy is not without cost because innocent victims of constitutional torts are left without redress.

Providing qualified immunity to government officials who engage in objectively unreasonable conduct in violation of clearly established law does nothing to further the purpose of qualified immunity and greatly increases the number of innocent constitutional tort victims who are

left without redress. Specifically, the public has no interest in encouraging government officials to engage in objectively unreasonable conduct in violation of well-settled law, and the public has a strong interest in providing redress to constitutional tort victims who are subjected to objectively unreasonable conduct in violation of well-settled law.

The Fifth Circuit's application of qualified immunity to the case at bar constitutes a manifest injustice both to Plaintiff Dunn and other victims of police misconduct and other objectively unreasonable constitutional torts committed by government officials.

E. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FIFTH CIRCUIT MISAPPLIED THE STANDARD FOR QUALIFIED IMMUNITY IN DETERMINING THAT A FOOTNOTE WHICH LEFT OPEN A QUESTION ALREADY ANSWERED BY THIS COURT WAS SUFFICIENT TO CREATE "UNSETTLED LAW" FOR QUALIFIED IMMUNITY PURPOSES.

This Court succinctly set out the elements for an excessive force case in *Graham v. Connor, supra.* In *Johnson v. Morel,* 876 F.2d 477 (5th Cir. 1989) (*en banc*), the Fifth Circuit, while purporting to be guided by this Court's decision in *Graham,* substantially changed the elements for excessive force, to wit: (1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness

of which was (3) objectively unreasonable. The Fifth Circuit explicitly left open the question of whether the significant injury requirement can be satisfied without a significant physical injury. *Johnson*, 876 F.2d at 480 n. 1.

The Fifth Circuit's tacked on "significant injury requirement" was squarely rejected by this Court in *Hudson v. McMillian*, 503 U.S. 1 (1992). Nevertheless, the Fifth Circuit shielded Defendant Officer Denk with qualified immunity because it concluded that whether significant physical injury was required to satisfy the significant injury requirement was unclear prior to *Hudson*, at which time the incident occurred.

By finding that it was unclear at the time of the incident whether significant physical injury was required to satisfy the significant injury requirement, the Fifth Circuit completely ignored this Court's holding in *Graham v. Connor* and created "unsettled law" where none previously existed.[2]

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[2] It is worth noting that this Court had previously determined that mental and emotional distress is compensable under Section 1983. *Carey v. Piphus*, 435 U.S. 247, 264 (1978). Thus, other circuits have had little difficulty in finding liability and awarding damages in excessive force cases where the victim suffered psychological injury. *Bailey v. Andrews*, 811 F.2d 366, 373 (7th Cir. 1987); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981); *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992).

II. THIS COURT SHOULD GRANT *CERTIORARI* IN ORDER TO RESOLVE THE IMPORTANT QUESTION OF WHETHER QUALIFIED IMMUNITY CONTINUES TO BE AVAILABLE IN EXCESSIVE FORCE CASES AFTER IT HAS BEEN DETERMINED THAT THE OFFICER USED OBJECTIVELY UNREASONABLE FORCE.

A. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICTING OPINIONS OF THE COURTS OF APPEALS REGARDING WHETHER OR NOT QUALIFIED IMMUNITY CONTINUES TO BE AVAILABLE AFTER IT HAS BEEN DETERMINED THAT THE OFFICER USED OBJECTIVELY UNREASONABLE FORCE.

In *Graham v. Connor, supra,* this Court expressly reserved the question of the proper application of qualified immunity to a Fourth Amendment excessive force claim. 490 U.S. at 399 n. 12. Since that time, the Circuit Courts have been in hopeless disarray concerning whether qualified immunity continues to be available after it has been determined that the officer used objectively unreasonable force.

The Ninth and Tenth Circuits have held that qualified immunity is not available after it has been determined that the officer used objectively unreasonable force. *See Alexander v. County of Los Angeles,* 64 F.3d 1315, 1322 (9th Cir. 1995), citing *Scott v. Henrich,* 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 2612 (1995); *Hopkins v. Andaya,* 958 F.2d 881, 885 n. 3 (9th Cir. 1992); *Mick v. Brewer,* 76 F.3d 1127, 1135 n. 5 (10th Cir. 1996); *Quezada v. County of Bernalillo,* 944 F.2d 710, 718 (10th Cir. 1991); *Street v. Parham,* 929 F.2d at 540 & 541 n. 2. (10th

Cir. 1991). The D.C. and First Circuits have indicated that they would reach the same result. *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C.Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2672 (1994); *Hunter v. District of Columbia*, 943 F.2d 69 (D.C.Cir. 1991); *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994).

The Second, Fifth and Seventh Circuits have held that qualified immunity continues to be available after objectively unreasonable force has been found. *Finnegan v. Fountain*, 915 F.2d 817, 822-23 (2nd Cir. 1990); *Dunn v. Denk*, 79 F.3d 401 (5th Cir. 1995) (*en banc*); *Harper v. Harris County, Texas*, 21 F.3d 597, 600 (5th Cir. 1994); *Brown v. Glossip*, 878 F.2d 871, 874-75 (5th Cir. 1989); *Jones by Jones v. Webb*, 45 F.3d 178, 183-84 (7th Cir. 1995); *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993). The Fourth, Sixth and Eighth Circuits have indicated that they would reach this result. *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994); *Slattery v. Rizzo*, 939 F.2d 213, 215-16 (4th Cir. 1991); *Doe v. Sullivan County, Tenn.*, 956 F.2d 545 (6th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 187 (1992); *Gainor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992).

Petitioner respectfully submits that the issue has been sufficiently vetted by the lower courts, and that it is now ripe for review in this Court. Without this Court's guidance, the lower courts will remain in hopeless conflict and confusion on this important issue.

B. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE IT MAKES NO SENSE TO SHIELD OFFICERS WHO USE OBJECTIVELY UNREASONABLE FORCE WITH QUALIFIED IMMUNITY IN ROUTINE EXCESSIVE FORCE CASES.

Since this Court decided *Graham v. Connor, supra,* the Circuit Courts have been in disarray and confusion over the proper application of qualified immunity to Fourth Amendment excessive force cases. This is not surprising because the objective reasonableness determination is the same for both the underlying excessive force claim and the qualified immunity analysis. If the officer's actions are objectively reasonable, he does not need qualified immunity. If the officer's actions are not objectively reasonable, he does not deserve qualified immunity.

CONCLUSION

For the reasons stated above, petitioner Mary Elizabeth Dunn requests this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

March 19, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 93-1964 & 93-9066

MARY ELIZABETH DUNN,

Plaintiff-Appellee,
Cross-Appellant,

versus

MIKE DENK,

Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court
For the Northern District of Texas

(Filed March 19, 1996)

Before POLITZ, Chief Judge, REAVLEY, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO GARZA, DEMOSS, BENAVIDES, STEWART, PARKER, and DENNIS, Circuit Judges.

KING, Circuit Judge:*

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* Judges Garwood, Jolly, Higginbotham, Davis, Jones, Smith, Duhé, Barksdale, Emilio M. Garza and DeMoss concur in the judgment and Part I of the opinion. Chief Judge Politz and Judges Reavley, Garwood, Higginbotham, Davis, Wiener, Benavides, Stewart, Parker and Dennis concur in Part II of the opinion.

This is a case controlled by the law applicable from 1989 to 1992, a window created by our decision in *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (en banc), and *Hudson v. McMillan*, 503 U.S. 1 (1992), the decision of the Supreme Court effectively overruling it. *See Harper v. Harris County, Texas*, 21 F.3d 597, 600 (5th Cir. 1994).

A.

The facts concerning Officer Denk's arrest of Ms. Dunn in 1990 and Dunn's ensuing suit under 42 U.S.C. § 1983 against Denk for, *inter alia*, excessive use of force in effecting her arrest are set out in full in the panel opinion and dissent, *Dunn v. Denk*, 54 F.3d 248. (5th Cir.), *reh'g en banc granted and opinion vacated by* 54 F.3d 248, 257 (5th Cir. 1995). As the panel majority described it, "[p]hysically, Dunn suffered only bruises but her psychological injury was substantial." *Id.* at 249. The jury found excessive force, but it did not award compensatory damages. It did award $10,000 in punitive damages. The district court entered judgment on the jury verdict, and Denk appealed. The question before us is whether Denk was entitled to qualified immunity as a matter of law.

We begin by determining whether Dunn alleged the violation of a clearly established constitutional right. She did so by alleging "excessive force . . . aris[ing] in the context of an arrest." *Graham v. Conner*, 490 U.S. 386, 394 (1987). Counsel for Denk correctly concedes that whatever injury requirement (if any) may remain after Hudson respecting a claim for excessive force in arrest is satisfied here. However, Denk contends that for purposes of qualified immunity we look to the state of the law when the

arrest at issue occurred. *Harper* at 601. Specifically, Denk's contention – a contention with which the panel majority originally agreed but has apparently abandoned[1] – is that for this January 1990 arrest, a Fourth Amendment excessive force claim was controlled by *Johnson*, and that under *Johnson*, Dunn was required to prove the following elements:

> "(1) a significant injury,[1] which
>
> (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
>
> (3) objectively unreasonable." *Id.* at 480.

The argument continues that in *Johnson*, we insisted that significant injury was an element of the constitutional claim, an objective, validating event of the reasonableness of force used in making an arrest. Finally, it is pointed out that in *Johnson*'s footnote 1, we observed:

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[1] The panel majority, Chief Judge Politz and Judge Reavley, specifically held:

> Although no longer required, at the time of this incident significant injury was a necessary element of an excessive force claim. Accordingly, to defeat Denk's qualified immunity defense Dunn was obliged to prove a significant injury.

Dunn v. Denk, 54 F.3d at 249. The dissent's newly-minted position – "[o]nce an officer uses objectively unreasonable force to effect an arrest, he loses his qualified immunity, whether the other elements of an excessive force claim [e.g., injury to the arrestee] are clearly established or not," *Dunn v. Denk*, ___ F.3d ___, ___ (5th Cir. 1996) (Reavley, J., dissenting) – is devoid of citation for the obvious reason that it finds no support in the case law.

> "We think it unlikely that such a significant injury will be caused by unnecessary force without significant *physical* injury. However, on the facts before us here, we do not decide whether a significant but non-physical injury would be legally sufficient." *Id.* at 480 n.1.

B.

Given the explicit language of *Johnson*, and its footnote 1 in particular, we concede that the law at the time of this arrest was uncertain regarding whether "a significant injury will be caused by unnecessary force without significant physical injury." On the present facts, Denk was entitled to qualified immunity from the claims asserted in this case.

II

In *Johnson*, we also distinguished between injuries resulting from excessive force and those resulting from the justified use of force. Looking at causation, we limited recovery to injuries that "resulted directly and only from the use of force that was clearly excessive to the need." *Johnson* at 480. We reject the contention that *Johnson*, in instances where its threshold requirement of significant injury was satisfied, precluded recovery for aggravation of preexisting injury caused by the use of excessive force. A trier of the fact can compensate only for injury caused by the use of excessive force. There can be no award for injury caused by reasonable force. *Johnson's* clause "(2) did not speak to the recovery for injuries for which a person is uniquely susceptible beyond insisting that compensation be for an injury caused by the excessive force

and not a reasonable force. In sum, this particular language of *Johnson* said no more, and we say no more today. The holding of *Wells v. Bonner*, 45 F.3d 90 (5th Cir. 1995), is not to the contrary. The aggravation of the old injury was not attributable to the excessive component of the force used. Rather, the aggravation of Well's old shoulder injury was claimed to have been caused by handcuffing his hands behind his back, a routine police procedure. *Id.* at 92.

The judgment below is REVERSED.

RHESA HAWKINS BARKSDALE, Circuit Judge, joined by Jolly, Jones, Smith, Emilio M. Garza and DeMoss, Circuit Judges, concurring in part and dissenting in part:

"Even if [Officer Denk's] conduct violates a constitutional right, he is entitled to qualified immunity if [his] conduct was objectively reasonable." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir. 1992); *Walton v. Alexander*, 44 F.3d 1297, 1301 (5th Cir. 1995) (en banc); *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993). This factor is "assessed in light of the legal rules clearly established at the time" of the January 1990 incident. *Salas*, 980 F.2d at 310. *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (en banc), controlled from early July 1989 until late February 1992, when its significant injury prong was overruled by *Hudson v. McMillian*, 503 U.S. 1 (1992). *See Harper v. Harris County, Tex.*, 21 F.3d 597, 600-01 (5th Cir. 1994).

I.

Dunn maintains that her emotional injury satisfies *Johnson's* significant injury requirement. But, as covered

in part I of Judge King's opinion, it was not clearly established at the time of the incident (only six months after *Johnson* was rendered) that a nonphysical injury, without significant physical injury, could satisfy this requirement. 876 F.2d at 480 & n.1. In fact, it was just the opposite. Therefore, I concur in part I of the opinion by Judge King, which agrees that qualified immunity must be accorded Officer Denk.

Along that line, I must register concern over the dissents' refusal to recognize our controlling law at the time of the incident. That by judge Dennis is especially remarkable; he simply declares *Johnson*, our en banc decision, "void ab initio", because he reads it as conflicting with *Graham v. Connor*, 490 U.S. 386 (1989), rendered shortly before *Johnson* and quoted from at length in it. Indeed, the Johnson en banc court began by stating that it was "[g]uided by" *Graham*, 876 F.2d at 478.

No authority need be cited for our rule that we are bound by our prior decisions, unless there is a superseding Supreme Court or en banc decision. There is neither in this instance. Instead, our court is faulted by Judge Dennis for supposedly, in an en banc opinion, not complying with an earlier Supreme Court opinion. Being able to decide individually whether one of our opinions applies earlier controlling law correctly would quickly usher in judicial anarchy. *See Grabowski v. Jackson County Public Defenders Office*, 47 F.3d 1386, 1398 (Smith, J., dissenting), *reh'g en banc granted*, 47 F.3d 1403 (5th Cir. 1995). Obviously, this is why our court long ago adopted our rule honoring our precedent.

II.

As for part II of Judge King's opinion, I must respectfully dissent. Her [sic] part I decides the case; it renders judgment for Officer Denk. Therefore, there is no need to proceed further; there is no need to address other aspects of the *Johnson* test – in this instance, *vel non* recovery for aggravation of a preexisting injury. At best, this court is rendering an advisory opinion. At worst, it is offering up language that may come back to haunt us. If nothing else, it has created a judicial quagmire that will bog down the bench and the bar, at considerable cost in time and expense, as both try to determine what weight should be accorded part II.

That is the legacy of *dictum*, "the gift that keeps on giving". And, part II is *dictum*, plain and simple. We have long known to avoid engaging in such an exercise. "It is a rule of universal application by the Supreme Court, as well as the other courts of this country, that no opinion can be considered as binding authority unless the case calls for its expression." *Indiviglio v. United States*, 249 F.2d 549, 561 (5th Cir. 1957), (*citing Carroll v. Carroll's Lessee*, 57 U.S. 275 (1853)), *rev'd on the other grounds*, 357 U.S. 574 (1958). This case does not call for this expression.

Accordingly, I concur in part I of Judge King's opinion, but must dissent from part II.

REAVLEY, Circuit Judge, joined by Politz, Chief Judge, Wiener, Benavides, Stewart, Parker and Dennis, Circuit Judges, dissenting.

Without the slightest justification beyond an arrest warrant for a traffic offense, a Texas patrolman injured a

woman by pulling her out of her car, putting her face-down into a ditch, kneeling on top of her and handcuffing her arms behind her. This court now holds that the patrolman is immune from liability for his violation of her civil rights. In the 1990's! In the Fifth Circuit! I dissent.

The panel opinion, 54 F.3d 248 (5th Cir. 1995), correctly states the facts of the case as it comes to us. The jury found that the officer employed force that was clearly excessive and objectively unreasonable, causing a significant injury to the plaintiff. She and the driver of the car testified that the officer jerked her from the car and threw her down into the ditch. She said that her arm, hip and wrists were hurt. A photograph introduced into evidence showed a large discoloration on her upper arm where she said the officer grabbed her. Her psychiatrist testified that she was traumatized emotionally and could suffer psychic instability for years to come.

I. Immunity to Use Excessive Force

Even though the jury verdict, amply supported by the evidence, found the force exercised by the officer to have been objectively unreasonable and excessive, this court renders judgment for the patrolman on qualified immunity grounds. This is a distortion of the law of qualified immunity. The Fourth Amendment protects all persons against unreasonable seizures. *Graham v. Connor,* 109 S.Ct. 1865 (1989). An officer who effects an arrest by excessive force against the person acts unreasonably and violates. the Fourth Amendment rights of the arrestee. There can be no qualified immunity for that officer.

Qualified immunity is a practical doctrine designed to balance several competing interests. On the one hand, damage suits against officials deter unlawful conduct and vindicate the constitutional rights of victims of official misconduct. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2736, 2739 (1982). On the other hand, social costs inevitably flow when government officials are subjected to lawsuits. These social costs include the expenses of litigation, the diversion of energy from official business, the deterrence of able citizens from acceptance of public office, and the danger that fear of suit will dampen the ardor with which officials discharge their duties. *Id.* at 2736.

Are any of the interests underlying qualified immunity served by granting immunity to an officer who uses objectively unreasonable force to effect an arrest? Certainly the public wants to deter such action, and the victim has an interest in being made whole from the damages the arrest caused. These interests are not served by granting immunity when objectively unreasonable force is used. On the other hand, need we fear that suits against officers who use objectively unreasonable force will "dampen the ardor with which such officers discharge their duties?" On the contrary, it is our fervent hope that such suits will dampen uncontrolled ardor. It also seems clear that the social costs of lawsuits and diversion of energies of the officer are well worth paying when the officer uses objectively unreasonable force, else such officers should be granted absolute immunity and the Fourth Amendment should be rewritten.

Qualified immunity is given to an officer to protect him from costly and troublesome litigation "unduly

inhibit[ing] officials in the discharge of their duties." *Anderson v. Creighton,* 107 S.Ct. 3034, 3038 (1987).

The inquiry is whether the totality of the circumstances justified the actions by which the seizure was carried out. *Tennessee v. Garner,* 105 S.Ct. 1694, 1699 (1985). The officer is not immune if his actions violated clearly established law. *Mitchell v. Forsyth,* 105 S.Ct. 2806, 2817 (1985) (citing *Harlow,* 102 S.Ct. at 2738). The law is clearly established that an unreasonable seizure violates the Fourth Amendment and is grounds for § 1983 liability. *Brower v. County of Invo,* 109 S.Ct. 1378 (1989). And the Court has said that the Constitution protects against the unnecessary infliction of pain. *Hudson v. McMillian,* 112 S.Ct. 995, 999 (1992); *Ingraham v. Wright,* 97 S.Ct. 1401, 1414 (1977).

The Court does not allow a federal cause of action for every unjustified physical contact. "The Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.' " *Hudson,* 112 S.Ct. at 1000 (quoting *Whitley v. Albers,* 106 S.Ct. 1078, 1088 (1986)). Undoubtedly, the same rule applies to excessive force claims under the Fourth Amendment. If the pleading, a *Spears*[2] hearing, or summary judgment record demonstrates conduct and effect of so minor a degree, the officer is entitled to judgment. But surely not because he enjoyed immunity to

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[2] *Spears v. McCotter,* 766 F.2d 179 (5th Cir. 1985).

effect the arrest, or abuse the prisoner, with excessive force.

In the present case the officer used objectively unreasonable force to arrest the plaintiff, and – in addition to lasting psychological harm – injured her arm, hip, and wrists in the process. That ends the qualified immunity inquiry.

The majority, however, are not ended. They go to a footnote in *Johnson v. Morel*, where the en banc court suggested that a non-physical injury might in that case not rise to the significance required for a cause of action.[3] The court reasons today that, because this footnote could be used to argue that psychological harm could not be the significant injury required for recovery in 1990, the law in this circuit at the time of the arrest gave the patrolman a defense and immunity.

To understand the court's misreckoning we need to go back to the panel opinion in *Johnson v. Morel*, 843 F.2d 846 (5th Cir. 1988), where the majority there retooled *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), to require a severe physical injury as a necessary element of a § 1983 action for the use of excessive force by a state officer. Judge Thornberry's dissent pointed out the error, see *Johnson*, 843 F.2d at 848, but this court has continued to hold that this erroneous version of *Shillingford* was

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[3] The footnote reads: "We think it unlikely that such a significant injury will be caused by unnecessary force without significant *physical* injury. However, on the facts before us here, we do not decide whether a significant but non-physical injury would be legally sufficient." *Johnson v. Morel*, 876 F.2d 477, 480 n.1 (1989) (en banc).

Fifth Circuit law from 1981 until 1989 when the *Johnson v. Morel* en banc decision downgraded the necessary injury from severe to significant.

The Supreme Court corrected us on the severe/significant injury requirement in *Hudson*, but we have retained it to immunize the conduct of officers at a time prior to the date of the Supreme Court's *Hudson* opinion. We have held that, so long as the prevailing law required proof of a significant injury (after *Johnson v. Morel*) for the victim to recover damages, there could be no excessive force unless it did cause such an injury. *See, e.g., Rankin v. Klevenhagen*, 5 F.3d 103, 108-09 (5th Cir. 1993); *Spann v. Rainey*, 987 F.2d 1110, 1114-16 (5th Cir. 1993); *Valencia v. Wiggins*, 981 F.2d 1440, 1448-49 (5th Cir. 1993); *Mouille v. City of Live Oak*, 977 F.2d 924, 928 (5th Cir. 1992); *King v. Chide*, 974 F.2d 653, 656-58 (5th Cir. 1992); *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1184-85 (5th Cir. 1990); *Mouille v. City of Live Oak*, 918 F.2d 548, 551 (5th Cir. 1990).

It is a curious twist of law. What, we should ask, is excessive force or objectively unreasonable force? What is its measure? What is its inquiry? Obviously whether it is objectively unreasonable and excessive to effect the arrest, to overcome the resistance or malefaction. The law, clear and certain and known by all reasonable officers, has forbidden force excessive to that purpose. Whether or not the Fifth Circuit has allowed the officer a defense where the excessive force caused lesser injury is a different question. But we have persisted in giving immunity to officers who violated acknowledged constitutional rights by the use of excessive force to arrest, no matter whether any force was justified and no matter how great

the force employed so long as the arrestee recovered from his injuries.

Qualified immunity is concerned only with the reasonableness of an officer's actions. Once an officer uses objectively unreasonable force to effect an arrest, he loses his qualified immunity, whether the other elements of an excessive force claim are clearly established or not.

We can only hope that the manuals and instructions to law enforcement officers have not told them that the Constitution and laws of the United States were so uncertain about their *conduct* and the *rights* of the public. That would be to "place various kinds of state-sponsored torture and abuse – of the kind ingeniously designed to cause pain but without a tell-tale 'significant injury' – entirely beyond the pale of the Constitution." *Hudson*, 112 S.Ct. at 1002 (Blackmun, J., concurring).

II. Immunity Even to Cause Significant Injury

A. Emotional Injury.

Even if the officer were entitled to immunity so long as no significant injury was suffered by his victim, that would not warrant the court's dismissal of this plaintiff's case. Because, clearly, she did suffer a significant injury. There was evidence of physical and psychological harm, although the jury was not asked to allocate significance between those harms. The majority choose the emotional injury for the only significance and hold that an officer would not know in 1990 that he would be liable for a brutal arrest causing non-severe physical injury coupled with severe *emotional* injury.

Let us suppose that officers had lawyers to advise them on how to escape liability while mistreating arrestees. How much leeway would counsel find in the *Johnson v. Morel* footnote? The footnote speaks of what is likely and refuses to decide "on the facts before us here" (where the plaintiff had been humiliated by racial epithets) "whether a significant but non-physical injury would be legally sufficient." *See supra,* note 2. The Supreme Court in *Carey v. Piphus* held in 1978 that damages were recoverable for mental anguish in a § 1983 action. 98 S.Ct. 1042, 1052 (1978). The *Johnson v. Morel* decision itself cited Carey for that proposition. In *Lynch v. Cannatella,* 810 F.2d 1363, 1376 (5th Cir. 1987), decided under the *Shillingford* regime, the Fifth Circuit upheld psychological injury as a sufficient injury to support recovery in an excessive force case. Other cases in this circuit held the same. *See, e.g., Checki v. Webb,* 785 F.2d 534, 538 (5th Cir. 1986) (under *Shillingford,* "[a] police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 claim against him. Similarly, where a police officer uses a police vehicle to terrorize a civilian . . . a court may conclude that the officers have crossed the 'constitutional line.' "); *Coon v. Ledbetter,* 780 F.2d 1158 (5th Cir. 1986) (a young girl who was in a trailer when a deputy sheriff unloaded a round of buckshot into it would prevail on a claim for excessive force, despite suffering no physical injuries, if she could prove the deputy acted at least recklessly); *Keyes v. Lauga,* 635 F.2d 330, 336 (5th Cir. 1981) (plaintiff could recover for excessive force because she suffered mental injuries along with

some bruises, a low-grade concussion, and numbness in her left thumb); *see also Foulds v. Corley,* 833 F.2d 52, 55 (5th Cir. 1987) (plaintiff's failure to allege "lasting harm" was not fatal to his § 1983 claim of cruel and unusual punishment because he alleged sufficient pain, suffering, and mental anguish to warrant relief).

Would the legal adviser to the brutish policeman have any reason to believe that this brief footnote did more than reserve judgment on the facts of *Johnson v. Morel* itself or that it injected uncertainty about psychological injury into the law, limiting the holding of *Carey v. Piphus* and overruling established law of the circuit? I think not.

The legal adviser would not think the footnote applicable to the present case for the further reason that this is not a case of a non-physical injury. The plaintiff suffered physical harm as well as emotional harm. The physical injuries were inextricably intertwined with the mental injuries, and the two combined to produce a single significant injury. Nothing in the *Johnson v. Morel* footnote suggests any uncertainty under these circumstances. The Seventh Circuit held in *Bailey v. Andrews,* 811 F.2d 366 (7th Cir. 1987), that "Bailey's physical injuries combined with the emotional distress he testified to could amount to compensable injury" under the Seventh Circuit's then-existing "severe injury" requirement. *Id.* at 373.

B. Open Season On The Infirm

The panel dissent, 54 F.3d at 252, argued that under the circuit precedent of *Wells v. Bonner*, 45 F.3d 90 (5th Cir. 1995), the significant injury requirement for an excessive force cause of action could not be met by the aggravation of a pre existing condition. I agree with Judge King that this is an erroneous reading of *Johnson v. Morel*, and I would not accept such a pernicious rule in any event.

Conclusion

This court today goes far afield in the search for uncertainty in the 1990 law, beyond where any lawyer – let alone a policeman –might have gone. And the court disregards entirely the officer's conduct as it grants him immunity. I dissent from the rendition of judgment excusing the defendant from liability.

DENNIS, Circuit Juge, dissenting.

I join in the dissenting opinion of Judge Reavley but write further to express my opinion that the significant injury element of *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) was void ab initio as controlling precedent because it was clearly in conflict with the holding of the United States Supreme Court in *Graham v. Conner*, 490 U.S. 386 (1989) for the reasons set forth by Judge Rubin in his dissenting opinion in *Johnson v. Morel*, 876 F.2d at 480 and for the additional following reasons.

The *Johnson v. Morel* three element test, based on a threshold significant injury requirement, was inherently inconsistent with the more fluid Fourth Amendment "objective reasonableness" standard set forth by the

Supreme Court in *Graham*. In *Graham*, the Supreme Court held that (1) claims under § 1983 alleging that a law enforcement officer used excessive force in the course of an arrest, investigatory stop, or other seizure of a free citizen were properly analyzed under the Fourth Amendment's "objective reasonableness" standard, and (2) under the Fourth Amendment standard:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion of the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner*, 471 US ___, at 8-9, 85 L Ed 2d 1, 105 S Ct 1694 (The question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure"). 490 US at 396 (Citations omitted)

This Fourth Amendment standard which requires a balancing of "the nature and quality of the intrusion on

the individual's Fourth Amendment interests" against "the countervailing governmental interests at stake," a standard that is "not capable of precise definition or mechanical applicaiton" and must be considered under "the totality of the circumstances" and with the "sort of seizure involved," is evidently incompatible with *Johnson v. Morel's* attempt to apply a three-element stereotypical test indiscriminately to all Fourth Amendment excessive force claims lodged against law enforcement officials under § 1983. In fact, the Supreme Court in *Graham* expressly rejected the "notion that all excessive force claims brought under § 1983 are governed by a single generic standard" *Id.* 490 US at 393 and reversed the Fourth Circuit Court of Appeals for applying in that Fourth Amendment case the four-factor generic test that had originated in *Johnson v. Click,* 481 F2d 1028 (CA2), cert. denied, 414 US 1033 (1973), the generic rigidity of which resembled that of the *Johnson v. Morel* test and called for the consideration of: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm. See *Graham v. Connor,* 490 US at 390.

APPENDIX B

PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

June 13, 1995

Mary Elizabeth DUNN, Plaintiff-Appellee-Cross-Appellant,

v.

Mike DENK, Defendant-Appellant-Cross-Appellee.

Nos. 93-1964, 93-9066.

United States Court of Appeals,
Fifth Circuit.

June 13, 1995.

Arrestee brought § 1983 action against officer, alleging malicious prosecution and use of excessive force. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., entered judgment on jury verdict awarding punitive but not compensatory damages, and cross-appeals were taken. After initially affirming, 954 F.2d 722, the Court of Appeals, Politz, Chief Judge, held that: (1) emotional trauma, or posttraumatic stress syndrome, caused by unwarranted arrest of vehicle passenger while on weekend pass from mental hospital, was "significant injury" capable of overcoming arresting officer's qualified immunity from claim that he used unconstitutionally excessive force, and (2) remand was required for recalculation of damages.

Affirmed in part, vacated in part, and remanded.

Rhesa Hawkins Barksdale, Circuit Judge, dissented and filed opinion.

M. Lawrence Wells, Karen D. Matlock, Asst. Attys. Gen., Dan Morales, Asst. Gen., Lucius D. Bunton, Jack R. Crier, Austin, TX, for Mike Denk.

Curtis B. Stuckey, Nacogdoches, TX, Stephen R. Marsh, Wichita Falls, TX, for Mary Dunn.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:

Mike Denk, a Texas Department of Public Safety officer, appeals an adverse jury verdict in Mary Elizabeth Dunn's civil rights lawsuit. Dunn cross appeals, seeking a new trial on damages. We affirm in part, vacate in part, and remand for further proceedings.

Background

Viewing the evidence most favorably to the jury's verdict we find the following scenario. On a weekend pass from a mental hospital, Dunn was being driven home by her friend, Hassan Keshari. As they approached an intersection Keshari spotted trooper Denk, who recently had cited him for minor traffic infractions. "Watch," Keshari told Dunn, "he is going to pull me over." Keshari was right. Although he came to a full stop at the intersection before turning, Denk stopped him and issued a ticket for "cutting the corner." Denk also took Dunn's driver's license to ticket her for not wearing a seatbelt. A check of her license revealed an outstanding warrant for failure to appear in relation to a speeding

ticket.[1] Denk told Dunn to exit her vehicle; when she stood up, he informed her that she was under arrest. Shocked, Dunn collapsed into her seat. Despite Keshari's protestation that she had just left the hospital, Denk pulled her from the car. The motion was such that she was thrown, face down, into a ditch by the side of the road.[2] With his knee in the small of Dunn's back Denk handcuffed her, pulled her up by her arms, placed her in the squad car, and transported her to jail where he called her a "bitch." Denk filed a charge of resisting arrest which the district attorney declined to prosecute.

Dunn brought suit under 42 U.S.C. § 1983, charging Denk with malicious prosecution and the use of excessive force. A jury returned a verdict for Denk on the former and for Dunn on the latter, awarding $10,000 in punitive damages but no compensatory damages. After unsuccessfully seeking post-judgment relief, Denk appealed the adverse judgment and Dunn cross appealed the failure to award actual damages.

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[1] The evidence reflects that Dunn had attended driver's school to have the ticket dismissed but that the requisite paperwork had not been completed.

[2] According to Denk's measurements the ditch was about two feet deep and the edge was approximately seven feet from the side of the highway.

Analysis

1. *Qualified immunity.*

Although no longer required,[3] at the time of this incident significant injury was a necessary element of an excessive force claim.[4] Accordingly, to defeat Denk's qualified immunity defense Dunn was obliged to prove a significant injury.[5] Denk maintains the evidence of such was legally insufficient.

Physically, Dunn suffered only bruises but her psychological injury was substantial. The evidence reflects that the incident sidetracked her recovery from depression. According to Dr. Richard C. Bibb, her psychiatrist:

> I felt that she was traumatized emotionally, and our term for that in the psychiatric field is post traumatic stress syndrome. . . . What Ms. Dunn was left with was just an unforgettable event which . . . will endure probably the rest of her life, which will leave her prone to anxiety and panic in situations that are usually considered routine, that will have a very subtle effect on her psychic stability for an undetermined period of time, which could be years.

This was more than mere "transient distress" which does not meet the "significant injury" threshold.[6] Denk insists, however, that psychological harm, no matter how severe,

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[3] *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

[4] *Johnson v. Morel*, 876 F.2d 477 (5th Cir.1989) (*en banc*).

[5] *Wells v. Bonner*, 45 F.3d 90 (5th Cir.1995).

[6] *Johnson*, 876 F.2d at 480.

did not constitute significant injury under clearly established law at the time of the arrest. We are not persuaded. It was clearly established before January 1990, when Denk arrested Dunn, that both physical and psychological injuries were compensable in civil rights actions.[7] We developed a significant injury requirement to weed out complaints that were "so minor as to occasion only a tort claim, not a constitutional invasion."[8] As a matter of law, however, this circuit has never restricted the injuries giving a claim constitutional dimension to merely those of a physical nature. To the contrary, as early as 1987 we recognized that psychological injury sufficed to support a constitutional cause of action. In *Lynch v. Cannatella,* an excessive force case, we held that an allegation of "a change in personality . . . as if [the plaintiff was] becoming crazy"[9] stated a sufficient injury to withstand summary judgment on the ground of qualified immunity. In *Hinojosa v. City of Terrell, Texas,*[10] although we found that the momentary fear experienced by the plaintiff when a police officer pointed a gun at him did not rise to the

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[7] *See, e.g., Hinshaw v. Doffer,* 785 F.2d 1260 (5th Cir.1986); *Keyes v. Lauga,* 635 F.2d 330 (5th Cir.1981).

[8] *Shillingford v. Holmes,* 634 F.2d 263, 265 (5th Cir.1981). *Shillingford* spoke in terms of "severe injury"; when we adapted the *Shillingford* test to meet the requirements of *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), we used the term "significant injury." There is no indication that we intended a "significant injury" to be more severe than a "severe injury." *See Brown v. Glossip,* 878 F.2d 871 (5th Cir.1989).

[9] 810 F.2d 1363, 1376 (5th Cir.1987).

[10] 834 F.2d 1223 (5th Cir.1988), *cert. denied,* 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989).

level of a constitutional violation, we expressly declined to impose a requirement of physical injury.[11]

The dissent conflates factual and legal sufficiency. In a footnote in *Johnson v. Morel* we stated, "We think it unlikely that such a significant injury will be caused by unnecessary force without significant **physical** injury."[12] The dissent interprets this footnote as a statement of law whereas the majority actually was making a factual observation. As a factual matter, it may well be that a significant injury usually will be physical, as precedents such as *Hinojosa* and *Wisniewski v. Kennard*[13] reflect. The case at bar, however, is exceptional; the evidence of record was sufficient for the jury to find significant injury in Dunn's emotional trauma.[14]

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[11] *See also Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir.1986) (recognizing the constitutional claim of arrestee's daughter, who suffered only emotional trauma in the defendants' assault on the family trailer home).

[12] *Johnson*, 876 F.2d at 480 n. 1.

[13] 901 F.2d 1276 (5th Cir.), *cert. denied*, 498 U.S. 926, 111 S.Ct. 309, 112 L.Ed.2d 262 (1990). In *Wisniewski*, we found that a prison escapee's complaints of fright and bad dreams resulting from his treatment upon apprehension did not present a jury question of significant injury.

[14] The dissent advances policy arguments against recognition of nonphysical significant injury. Its arguments are moot in light of *Hudson*. In any event, its complaint that a traumatic experience for one person might cause mere transient distress for another highlights a problem with the significant injury requirement itself, not with the acceptance of psychoiogical injury as potentially significant; it puts the focus on the effect of the officer's action on the plaintiff rather than on the relationship between the need for force and the amount of force exerted, where it properly belongs.

The dissent also suggests that Dunn did not satisfy *Johnson's* causation requirement – that the injury "resulted directly and only from the use of force that was clearly excessive to the need"[15] – because her trauma in part stemmed from her emotional vulnerability at the time of her arrest. The dissent misconstrues the *Johnson* causation requirement. The "directly and only" language was intended to distinguish between injuries resulting from **excessive** force and those resulting from the **justified** use of force.[16] It was not intended to displace the venerable rule that a tortfeasor takes his victim as he finds him[17] or to immunize the exacerbation of a pre-existing condition, leaving the weakest and most vulnerable members of society with the least protection from police misconduct.[18] The evidence supports a finding that the emotional trauma which Denk inflicted on Dunn was a significant injury distinct from the depression for which she was hospitalized, resulting "directly and only" from the use of excessive force.[19]

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[15] 876 F.2d at 480.

[16] *Id.; see also Hay v. City of Irving, Texas*, 893 F.2d 796 (5th Cir.1990); *Huguet v. Barnett*, 900 F.2d 838 (5th Cir.1990).

[17] *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir.1989).

[18] Unlike the dissent, the majority reads *Wells* as holding that the exacerbation of the plaintiff's pre-existing shoulder injury was not significant. The dissent's interpretation is foreclosed by circuit precedent.

[19] Denk also asserts that *Hudson* requires proof that the defendant acted "maliciously and sadistically to cause harm." 503 U.S. at 6, 112 S.Ct. at 999. *Hudson* was an eighth amendment case. Dunn's fourth amendment claim is governed by *Graham*, which adopts an objective reasonableness test.

2. *Juror misconduct.*

Denk contends that juror Chester Cox dissembled during *voir dire* by not admitting to a prior arrest. Cox, by affidavit, insists that he raised his hand but was overlooked. The record does not establish misconduct. Further, Denk's attorney knew of the prior arrest early in the trial but chose to remain silent until the return of an adverse verdict. The delay waives the objection.[20]

Denk also complains that a previous reprimand in his personnel file was mentioned during jury deliberations, even though the personnel file was excluded from evidence. Two jurors apparently learned of the rebuke from a newspaper article which the district court directed the jury to disregard. The bare mention of a prior reprimand does not raise a reasonable possibility of prejudice, particularly in light of the court's admonishment.[21] The district court did not abuse its discretion in denying Denk's motion for a new trial.

3. *Damages.*

After finding excessive force, the jury awarded $10,000 in punitive damages but no compensatory damages. We agree with the parties that the denial of compensatory damages was inconsistent with the finding of

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[20] *Garcia v. Murphy Pacific Marine Salvaging Co.*, 476 F.2d 303 (5th Cir.1973).

[21] *Cf. Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266 (5th Cir.) (brief mention of extraneous information, corrected by jury foreman, does not create a reasonable possibility of prejudice), *cert. denied*, 493 U.S. 823, 110 S.Ct. 83, 107 L.Ed.2d 49 (1989).

liability, which presupposed significant injury. We are not persuaded that the inconsistency demonstrates impermissible compromise. The jury obviously struggled mightily to reach a verdict; it succeeded in doing so. Its confusion over the appropriate allocation of damages does not undermine our confidence that in reaching its verdict it found the use of excessive force.[22] We accordingly affirm the finding of liability and remand for a new trial limited to the issue of damages, both compensatory and punitive.

Denk further challenges the award of punitive damages. We find ample support in the record for such an award. We do not reach the procedural and legal objections[23] because of our decision to order a partial new trial.

4. *Attorney's fees.*

The district court awarded Dunn $17,500 in attorney's fees of the $65,500 requested. Nonetheless Denk claims the award was excessive, noting that Dunn obtained only $10,000 in damages compared to the $200,000 sought.[24] This method of weighing the value of

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[22] To impeach the verdict, Denk submits the affidavit of a juror who subsequently recanted her vote. It is well established that a juror may not testify to the course of deliberations or to the jury's mental processes. Fed.R.Evid. 606(b); *United States v. Straach,* 987 F.2d 232 (5th Cir.1993).

[23] Denk contests the district court's entry of a judgment for $1 in nominal damages and argues that punitive damages may not be assessed without the award of compensatory damages.

[24] Defendant's motion for summary judgment on the grounds of qualified immunity was denied. We affirmed, 954 F.2d 722 (5th Cir.1992) (memo).

legal services fails to take cognizance of the degree of success obtained.[25] The award was not an abuse of discretion. On cross appeal, Dunn maintains that she is entitled to additional attorney's fees if she wins higher damages on retrial. We do not reach that argument; it is premature.

AFFIRMED as to liability, VACATED and REMANDED for further proceedings as to damages consistent herewith.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting:

"Delays have dangerous ends." *Henry VI, Part 1* (1592) act 3, sc. 2, 1.33. This is especially true for law enforcement officers making an arrest. It is no less true for the arrest made by Officer Denk. For this Fourth Amendment excessive force claim that arose in 1990, the majority has incorrectly applied the applicable qualified immunity standard of *Johnson v. Morel*, 876 F.2d 477 (5th Cir.1989) (en banc). I respectfully dissent.

I.

As the majority notes, we must view the evidence in the light most favorable to the jury's verdict. But, even in that light, certain critical parts of the puzzle are missing from the majority's summary; they need to be included in order to better appreciate the misunderstanding, and regrettable incident, that took place when Dunn was arrested.

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[25] *Cf. TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705 (5th Cir.1994).

Dunn testified that, because she was having problems with depression, was crying all the time, and needed help, she was hospitalized. While on a weekend pass, and riding as a passenger in a vehicle driven by her boyfriend, the vehicle was stopped by Officer Denk. (His right to stop the vehicle, as well as to later arrest Dunn, are not in issue.)

The vehicle pulled over to the side of the road on a grassy shoulder. From the side of the road to the ditch was approximately seven feet; the ditch was dry and covered with tall grass. And, obviously, because the car was beside the road, from the passenger door to the ditch was no more than a step or two. (Officer Denk testified that when you stepped from the passenger side of the vehicle, you were almost in the ditch.)

Dunn is approximately 5′ 7″ tall, and, at the time of the incident, weighed approximately 160 pounds; Officer Denk was approximately the same size. After Dunn exited the vehicle, and Officer Denk announced that she was under arrest, she sat back down in the vehicle; and when she would not exit, Officer Denk forcefully pulled her out. They both ended up in the grassy ditch. (His version is they both lost their balance.)

There were four witnesses to the incident: Dunn, her boyfriend, Officer Denk, and a bystander. It is disputed when the boyfriend advised Officer Denk that Dunn had been in the hospital. The bystander heard the comment when Officer Denk was pulling Dunn from the vehicle, and this is in line with the boyfriend's testimony; in

short, the comment was made while the incident was in progress.[1]

The jury was instructed properly for a constitutional excessive force claim that arose in 1990. For example, using language from *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989), quoted in *Johnson*, 876 F.2d at 479, discussed *infra*, the charge cautioned the jury that, for Fourth Amendment purposes, in judging the "reasonableness" of the force used, "[t]he nature of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." The charge on qualified immunity is not at issue; we must determine only whether, as a matter of law, the jury could reasonably find as it did.

II.

It goes without saying that, to avoid a qualified immunity defense, a plaintiff must claim a constitutional violation that was clearly established at the time of the alleged wrongful conduct. *E.g., Walton v. Alexander*, 44 F.3d 1297, 1301 (5th Cir.1995). And, it is undisputed that

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[1] Perhaps in order to set the tone, the majority states also that, after Officer Denk transported Dunn to jail, "he called her a 'bitch' ". I fail to see how this comment has any bearing on whether excessive force had been used earlier. (Officer Denk testified that, upon reaching the jail, he advised the jailer that he "better watch her, she's acting like a bitch".)

the clearly established law for this case is stated in *Johnson*. 876 F.2d at 479-80.[2] It provides:

> A plaintiff can thus prevail on a Constitutional excessive force claim only by proving each of these three elements:
>
> (1) a significant injury, which
>
> (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
>
> (3) objectively unreasonable.
>
> If any one of these elements fails, so too does the plaintiff's claims. We overrule all previous decisions of this circuit to the contrary. *Id.* at 480 (internal footnote omitted).

As discussed below, this case fails the first two prongs of the Johnson test.

A.

The majority recognizes that Dunn's extremely minor physical injuries (*e.g.*, bruises to her arm and hip) failed to establish significant injury. *See Wise v. Carlson*, 902 F.2d 417 (5th Cir.1990) (finding bruises to chest and forearm, as well as hematoma on upper eyelid insufficient as a matter of law). Therefore, the question is framed

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[2] *See Harper v. Harris County, Tex.*, 21 F.3d 597, 600 (5th Cir.1994) (recognizing that *Johnson*'s significant injury prong was overruled by *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)). But, as the majority states, and under the well-established law at the time of the incident at issue here, *Johnson* is the applicable standard. *Harper*, 21 F.3d at 601.

squarely: Can nonphysical injury qualify as significant injury under *Johnson?* And, if so, was the right to be free from nonphysical injury clearly established in 1990 – when the incident occurred?

1.

In concluding most summarily that, as a matter of law, the evidence was legally sufficient for the nonphysical injury to be "significant", the majority begins by stating, "It was clearly established before January 1990 . . . that both physical and psychological injuries were compensable in civil rights actions".[3] But, this is not the issue. I do not question that, once a plaintiff has satisfied the Johnson test, she may be compensated for nonphysical injury. The issue is whether a nonphysical injury, standing alone, will pass the *Johnson* test. For that question, the majority relies primarily on one case (again, pre-*Johnson*), *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir.1987), which does not support its conclusion.

The majority notes that *Lynch* speaks of a "change in personality" allegation. But, this allegedly resulted from being "beaten and drugged", *id.* at 1376; and only allegations were in issue, the case being on interlocutory

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[3] The majority cites two pre-*Johnson* cases, both of which involved sufficient *physical* injury to support excessive force claims. *See Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir.1986) (various physical injuries requiring two-day hospitalization); *Keyes v. Lauga*, 635 F.2d 330 (5th Cir.1981) (concussion). In both cases, the plaintiff was allowed to recover damages for nonphysical injury, but neither case holds that nonphysical injury, standing alone, can support an excessive force claim.

appeal. Among other distinguishing features from Dunn's nonphysical injury, our court noted in *Lynch* that the plaintiff alleged physical and nonphysical injury, and *Lynch* was only in the initial stages of litigation. Here, Dunn's action having been tried, it is beyond dispute that there is no actionable physical injury. In sum, I cannot agree with the majority's suggestion that *Lynch* stands for the proposition that our court held before 1990 that psychological injury, *without more*, can support a constitutional excessive force claim.[4] Indeed, a case cited by the majority, *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1230 (5th Cir.1988), *cert. denied*, 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989), decided after *Lynch* (but, once again, before *Johnson*), suggests that the issue was undecided in our circuit: "This Court does not here determine whether or not some type of physical injury will in *every* instance be necessary for [an excessive force claim]." (Emphasis in original.)

Moreover, the precedential value, if any, of *Lynch* is otherwise most questionable, because, as noted, it predates our en banc decision in *Johnson*. As quoted earlier, after establishing the excessive force/qualified immunity test, the *Johnson* court stated that it "overrule[d] all previous decisions of this circuit to the contrary". 876 F.2d at

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[4] The majority also cites *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir.1986) (yet again, pre-*Johnson*). Although one of the plaintiffs in Coon appeared to have suffered only "sleeplessness and nightmares", the sufficiency of the injury was not at issue. Our circuit has held squarely that this type of injury is insufficient under the *Johnson* test. *Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir.), *cert. denied*, 498 U.S. 926, 111 S.Ct. 309, 112 L.Ed.2d 262 (1990).

480. In addition, in a footnote to the term "significant injury", *Johnson* stated: "We think it unlikely that such a significant injury will be caused by unnecessary force without significant *physical* injury." *Id.* at 480 n. 1 (emphasis in original). Although this language was *dicta*, it nonetheless casts into serious doubt any prior decisions of our court which might suggest that nonphysical injury is *Johnson* "significant injury".

Therefore, prior to today's decision, whether non-physical injury can be "significant injury" was an open question. *See Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir.) (refusing to reach "difficult" issue of whether significant injury exists absent physical injury), *cert. denied*, 498 U.S. 926, 111 S.Ct. 309, 112 L.Ed.2d 262 (1990). It is necessary, therefore, to examine more closely today's swift, bold step.[5]

The starting point, of course, is *Johnson*, which was guided by *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), handed down just two months earlier. As dictated by *Graham*, *Johnson* recognized that the standard is Fourth Amendment "reasonableness", and that

> [t]he calculus of reasonableness must embody allowance for the fact that police officers are

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[5] As described in note 2, *supra*, it is now established that *Johnson* is applicable to constitutional excessive force claims arising only during the relatively brief period between *Johnson* and *Hudson* – July 5, 1989 to February 25, 1992, approximately 32 months. In light of the considerable passage of time since then, statutes of limitation, etc., we have no way of knowing how many *Johnson* claims are still percolating in our circuit.

> often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

876 F.2d at 479 (quoting *Graham*, 490 U.S. at 396-97, 109 S.Ct. at 1871-72). Accordingly, in a passage that demonstrates compellingly why Officer Denk is sheltered by qualified immunity for the incident in issue, *Johnson* counseled that

> [i]njuries which result from, for example, an officer's justified use of force to overcome resistance to arrest do not implicate constitutionally protected interests. An arrest is inevitably an unpleasant experience. An officer's use of excessive force does not give constitutional import to injuries that would have occurred absent the excessiveness of the force, or to minor harms. Nor can transient distress constitute a significant injury.

Id. at 480.

As quoted, *Johnson* observed that mere "transient distress" would not suffice, and found it "unlikely" that *any* nonphysical injury could be sufficient. *Id.* at 480 & n. 1. Our en banc court's *inclination* in *Johnson* to reject nonphysical injury creates, at least for me, a reluctance to adopt the majority's position. Within the excessive force framework of *Johnson*, the allowance of nonphysical injury gives rise necessarily to most difficult causation questions. For example, and viewing the circumstances in Dunn's favor, Dunn was thrown into a dry ditch covered with tall grass and handcuffed; as a result, she suffered "post traumatic stress syndrome. . . . which will leave her prone to anxiety and panic . . . for an undetermined

period of time". Compare this with *Wisniewski v. Kennard*, where a deputy sheriff hit a prisoner in the stomach twice, put the barrel of a gun in the prisoner's mouth, and "threatened to blow his head off". 901 F.2d at 1277. Under what were clearly stronger circumstances than those presented in today's case, the prisoner in *Kennard* alleged that he was frightened and had bad dreams. *Id.* Our court upheld summary judgment for the deputy sheriff, finding no significant injury under *Johnson*. *Id.*

What can be made of these two very different results -- results from decidedly different circumstances? Was the prisoner's mental health extraordinarily stable, or is Dunn's particularly fragile? And if hers is particularly fragile, would her mental condition have arisen simply from her arrest, absent the use of any force?[6] Regardless of the answers to these questions, the point is only that, in the context of *Johnson* excessive force, the subjectivity of nonphysical injury creates enormous difficulty vis-a-vis the leeway that must be granted law enforcement officers working in tense, unpredictable, fast moving, and dangerous situations. As *Johnson* stated, "[a]n arrest is inevitably an unpleasant experience." 876 F.2d at 480. The entire thrust of *Johnson* is to secure working room for law enforcement officers, so that they can perform their work

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[6] Evidence in the record points up this possibility. For instance, it appears that a large part of Dunn's anguish resulted merely from the humiliation of being arrested, and her fear that Officer Denk might shoot her companion if he attempted to intervene in her arrest (there is no evidence that her companion made any significant attempt to intervene, or that Officer Denk tried to shoot him).

(sadly, needed now, more than ever, in this Nation) without fear of civil liability at every turn. And, as discussed below, this is why law enforcement officers are entitled to guidance on whether their conduct will result in civil liability. In short, *Johnson*'s implied rejection of nonphysical injury was correct.

2.

In the alternative, it is well to remember that the qualified immunity analysis does not necessarily determine whether an official's conduct was *proper*, only whether it can be the basis for civil liability. Therefore, even assuming *arguendo* that nonphysical injury can be "significant" under *Johnson*, the question remains whether this rule was "clearly established" at the time of the incident in issue, so as to place Officer Denk outside the protection of qualified immunity. If it was not, Officer Denk is protected by that immunity. *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987); *Doe v. State of Louisiana*, 2 F.3d 1412, 1416 (5th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994).

It was "clearly established" in 1990 that Dunn was entitled to be free from significant injury resulting from unreasonable force. *Johnson*, 876 F.2d at 480. The question, however, is whether Officer Denk should be held liable for causing an injury, the significance of which was not clearly established, and instead, as per *Johnson*, was clearly *doubted*. Guiding my concern is the Supreme Court's pronouncement that "[t]he contours of the right must be sufficiently clear [so] that a reasonable official

would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039. As the Court has explained, the very purpose of the "clearly established right" requirement is so that officials may "reasonably . . . anticipate when their conduct may give rise to liability for damages". *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019, 82 L.Ed.2d 139 (1984).

We assume that officials know the law on excessive force. Accordingly, in 1990, a reasonable officer could conclude correctly that he must only make certain his use of force, no matter how unreasonable, did not cause "significant injury".[7] Furthermore, in light of *Johnson*, an officer could conclude reasonably that "significant injury" did not include nonphysical injury.[8] But surely, at the very least, the "contours of the right" were not sufficiently clear. Rather than providing a basis for an officer to "reasonably anticipate" liability, *Johnson* has been

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[7] No doubt, and as it should have, *Johnson* afforded broad working room for police officers. In any event, the correctness of that decision is not in issue; we apply the law as it existed in 1990.

[8] In addition, it seems clear that Officer Denk was not aware of Dunn's mental condition. Dunn's boyfriend testified that he told Officer Denk that Dunn had just been released from the "hospital"; but, as noted, this was not until Dunn was being removed from the vehicle. Moreover, the companion made no reference to a "mental hospital", and gave no other indication that Dunn was emotionally unstable. In fact, Dunn's doctor admitted that Officer Denk "had no way of knowing that [Dunn] was a patient in a psychiatric hospital". (The reference to the hospital may well have put Officer Denk on notice that he was dealing with a *physically* weak individual; but, again, Dunn's physical injuries are not in issue.)

made misleading, considering the majority's holding today, because *Johnson* clearly suggests, even if it does not hold, that nonphysical injury will be insufficient.

Therefore, regardless of whether an excessive force plaintiff has the right, under *Johnson*, to constitutional protection against nonphysical injury, that right was not clearly established in 1990. Accordingly, Officer Denk was entitled to qualified immunity.

B.

In addition to significant injury, *Johnson* requires, *inter alia*, that the injury result "*directly and only from* the use of force that was clearly excessive to the need". 876 F.2d at 480 (emphasis added). On this point, our court's very recent precedent requires a result contrary to the majority's.

In *Wells v. Bonner*, 45 F.3d 90, 92 (5th Cir.1995), Wells brought, among other things, a claim for the excessive force used against him during his arrest, alleging injury to his shoulder. Our court reversed the denial of qualified immunity, holding:

> Wells's claim fails to satisfy the second element of the excessive force test because his injury did not result "directly and only from" the officers' use of force. It is true that the record reflects that his shoulder was injured by the officers during the arrest. Wells admits, however, and other portions of the record also reflect, that the injury was an exacerbation of an old shoulder injury for which Wells previously had undergone surgery. Thus, Wells's injury did

not result "directly and only from" the officers' use of force. *Id.* at 96.[9]

The case at hand is virtually indistinguishable from *Wells*. Dunn's original complaint admitted that her non-physical injury consisted only of a "relapse of her mental condition", and that, at the time of the incident, she was depressed and vulnerable. The record contains substantial evidence of Dunn's past mental difficulties. Eleven days before her encounter with Officer Denk, she was hospitalized, in a state of "severe depression and agitation". And, only about four hours before the incident, she was released from the hospital on a "therapeutic pass", in order "to see if she could cope outside the hospital setting".

Dunn's doctor testified that Dunn "wasn't prepared for [the incident]" and that the incident "was a shock, and it – of all the issues that we were working with in terms of her recovery, this threw everything off track". Describing her own condition, Dunn stated that her "depression was biological, and it seemed like every little issue just compounded what was going on".

In view of the evidence of Dunn's prior mental condition, it is clear that, as in *Wells*, Dunn's mental injury did not result "directly and only from" Officer Denk's use

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[9] The majority reads *Wells* as holding only that the plaintiff's exacerbation of his pre-existing injury was not a significant injury. However, the clear and specific holding of *Wells* rests on the causation prong of the *Johnson* test, not the significant injury prong. The majority also states that my reading of *Wells* is contrary to circuit precedent, but cites no authority for this observation.

of force. As with Wells' shoulder injury, Dunn's alleged mental injury as a result of Officer Denk's actions was, at worst, an exacerbation of a pre-existing condition. As such, her claim fails the causation element of *Johnson*.

Finally, along this line, it bears repeating that the jury found that Officer Denk's actions did *not* injure Dunn in any shape, form, or fashion. It awarded only punitive damages, refusing to award damages to "compensate . . . Dunn for . . . damages proximately caused by the use of [Officer Denk's] excessive force. . . . "[10] How can

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[10] The jury's response to the actual damages special interrogatory was as follows:

> What sum of money, if any, would fairly and reasonably compensate Plaintiff Mary Elizabeth Dunn for each of the following damages proximately caused by the use of excessive force for which you have found that Defendant Mike Denk is liable?
>
> Answer in dollars and cents or "None".
>
> a. Past mental anguish, emotional distress, and mental pain and suffering:
>
> ANSWER: $NONE
>
> b. Future mental anguish, emotional distress, and mental pain and suffering:
>
> ANSWER: $NONE
>
> c. Lost income:
>
> ANSWER: $NONE
>
> d. Medical bills:
>
> ANSWER: $NONE
>
> e. Past physical impairment:
>
> ANSWER: $NONE
>
> f. Past physical pain and suffering:
>
> ANSWER: $NONE

we hold that Dunn's alleged injuries were "directly and only from" Officer Denk's actions, when the jury found none? In my opinion there is but one answer: we cannot.[11]

III.

This case is a classic example of the upset and misunderstanding that can result from an arrest. Surely, pursuant to the requisite objective reasonableness standard, Officer Denk, under the circumstances, was justified in removing Dunn from the vehicle. When he told her she was under arrest, she sat back down in the car. What was a reasonable officer to do – tell her he was going to count

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[11] The majority attempts to find causation by stating that the *Johnson*

> "directly and only" language was intended to distinguish between injuries resulting from **excessive** force and those resulting from the **justified** use of force. It was not intended to displace the venerable rule that a tortfeasor takes his victim as he finds him or to immunize the exacerbation of a pre-existing condition, leaving the weakest and most vulnerable members of society with the least protection from police misconduct.

(Emphasis by majority; footnotes omitted.) Because I believe the causation element is flatly precluded by *Johnson* and *Wells*, I need respond only briefly.

The "tortfeasor takes his victim as he finds him/weakest and most vulnerable" argument would truly open the floodgates for excessive force claims for nonphysical injury. Doubtless, this is why *Johnson* struck the necessary balance that it did. In short, the majority is doing nothing but attempting to rewrite *Johnson*. This it cannot do.

to three? Objectively, Dunn's reaction to the arrest announcement was passive resistance, indicating she was not going to comply with Officer Denk's instructions. He acted as a reasonable officer would, should, *and, indeed, must*. For the reasons stated, I would reverse the judgment on qualified immunity, and, therefore, must respectfully dissent.

APPENDIX C

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

August 10, 1993

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MARY ELIZABETH DUNN	§	
Plaintiff	§	
	§	
V.	§	CIVIL NO. CA7-90-0016
MIKE DENK,	§	
	§	
Defendant	§	

FINAL JUDGMENT

(Filed Aug. 10, 1993)

The above-styled cause coming on to be heard for the selection of a jury and the commencement of trial on July 19, 1993; the trial having concluded on July 21, 1993; the jury having returned a verdict on July 22, 1993; the jury having found that Defendant Mike Denk used excessive force against Plaintiff Mary Elizabeth Dunn in response to Interrogatory No. 1; the jury having further found that the use of excessive force did not cause Plaintiff Mary Elizabeth Dunn any damages in response to Interrogatory No. 2; the jury having further found that Defendant Mike Denk is not liable to Plaintiff Mary Elizabeth Dunn on her malicious prosecution claim in response to Interrogatory No. 3; the jury having further left the damage section for the malicious prosecution claim blank in response to Interrogatory No. 4; the jury having further found that punitive damages should be assessed against Defendant Mike Denk in response to Interrogatory No. 5; and the jury having awarded Plaintiff Mary Elizabeth Dunn Ten

Thousand Dollars ($10,000.00) punitive damages against Defendant Mike Denk; it appearing to the Court that Defendant Mike Denk is liable to Plaintiff Mary Elizabeth Dunn in the amount of One Dollar ($1.00) nominal damages in the absence of actual damages as a matter of law; it further appearing to the Court that the award of One Dollar ($1.00) in nominal damages fully supports the award of Ten Thousand Dollars ($10,000.00) in punitive damages against Defendant Mike Denk in behalf of Plaintiff Mary Elizabeth Dunn; and the Court being otherwise sufficiently advised;

IT IS ORDERED, ADJUDGED AND DECREED that judgment for nominal damages be, and hereby is, entered against Defendant Mike Denk and in behalf of Plaintiff Mary Elizabeth Dunn in the amount of One Dollar ($1.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment for punitive damages be, and hereby is, entered against Defendant Mike Denk and in behalf of Plaintiff Mary Elizabeth Dunn in the amount of Ten Thousand Dollars ($10,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the post-judgment interest shall accrue from the date of this judgment on all damages, both nominal and punitive, at the rate provided by 28 U.S.C. §1961 until the judgment is satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs be, and hereby are, taxed against Defendant Mike Denk.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that execution may issue for all damages and costs.

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that the issue of statutory attorney fees be, and hereby is, in all things SEVERED and that Plaintiff Mary Elizabeth Dunn shall have thirty (30) days from the date of this judgment to file her motion for statutory attorney fees.

SIGNED AND ENTERED this 10 day of August, 1993.

/s/ David O. Belew, Jr.
HONORABLE DAVID O. BELEW, JR.
SENIOR DISTRICT JUDGE

APPENDIX D

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AMENDMENT IV – SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon Probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the Persons or things to be seized.

APPENDIX E

42 U.S.C. §1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other Proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

APPENDIX F

REHEARING *EN BANC*

AUGUST 1, 1995

Mary Elizabeth DUNN, Plaintiff-Appellee-Cross-Appellant,

v.

Mike DENK, Defendant-Appellant-Cross-Appellee.

Nos. 93-1964, 93-9066.

United States Court of Appeals,
Fifth Circuit.

Aug. 1, 1995.

Appeals from the United States District Court for the Northern District of Texas; David O. Belew, Jr., Judge.

(Opinion June 13, 1995, 5 Cir., 1995, 54 F.3d 248)

Before POLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART and PARKER, Circuit Judges.

BY THE COURT:

A majority of the judges in active service, on the court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of supplemental briefs.